

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 28 August 2003

BALCA Case No.: 2002-INA-245
ETA Case No.: P2000-CA-09502804/ML

In the Matter of:

SONORA BAKERY PANADERIA,
Employer,

on behalf of

MARTA S. PANDOL,
Alien.



Appearance: Isabel Mauri, Esquire
Santa Ana, California
For Employer and Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of "Baker/Argentine Style."¹ The CO denied the application and Employer requested review pursuant to 20 C.F.R. §656.26.

¹ Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On August 2, 1999, Sonora Bakery Panaderia ("Employer") filed an application for labor certification to enable Marta S. Pandol ("Alien") to fill the position of "Baker/Argentine Style." (AF 11). The job requirement was three years in the job offered, and the hourly rate of pay was \$11.75 per hour. The job was described as follows:

Will [be] required to mix and bake various ingredients according to prescribed recipes to produce Argentine breads, pastries, cakes, including chaja cake, bread for Argentinian TE sandwiches, dough for empanadas and tarts. Will be required to roll, cut, shape dough to form bread, rolls, etc. preparing for baking.

On April 18, 2002, the CO issued a Notice of Findings ("NOF"), proposing to deny certification. (AF 6). The CO determined that the application included overly restrictive requirements in violation of 20 C.F.R. §656.20(c)(8), suggesting that the position was tailored to the unique experience of the Alien. Employer was advised it needed to submit documentation that the job existed and had been previously filled at the same requirement level, such documentation to include position descriptions, organizational charts, payroll records, etc. In the alternative, Employer could show that there had been a major change in business operation which caused the job to be created.

Citing 20 C.F.R. §656.3, the CO noted that the Job Service records indicated that Employer had never paid anyone more than \$10 per hour, and therefore, there was some question whether there was an actual opening and/or that Employer could provide full-time employment to which U.S. workers could be referred. Employer was directed to submit rebuttal documenting its ability to provide permanent, full-time employment to a U.S. worker at the terms and conditions stated on the ETA 750A. This was to include a copy of Employer's business license, and state and federal business income and business tax returns. Finally, the CO found that the job requirements were unduly

restrictive in violation of 20 C.F.R. §656.21(b)(2)(i)(A), as three years of experience and experience as an Argentine baker were not normally required for the position of baker. The Specific Vocational Preparation time (“SVP”) for the occupation of baker, as that position is listed in the Dictionary of Occupational Titles (“DOT”) at Section 313.381-010, is one to two years. With regard to the requirement of experience as an Argentine baker, the CO noted that Employer had always listed itself as a Mexican bakery. Rebuttal for the three years of experience requirement could be achieved by amending the restrictive requirement and stating a willingness to retest the labor market. To justify the requirement of experience as an Argentine baker, Employer needed to establish that the requirement was a business necessity or submit documentation that the requirement was usual in the occupation/industry.

Employer submitted rebuttal on May 17, 2002, consisting solely of a letter signed by counsel and Employer. (AF 4). Therein, Employer argued that the CO erred in determining that the SVP was that for baker as found in the DOT at Section 313.381-026. Employer contended that the position was that of a pastry cook, and therefore, three years was not an excessive requirement. Employer further stated that its federal tax returns for the tax year 2000 indicated a gross income of nearly \$1.6 million; however, the rebuttal did not include a copy of that tax return or any other documentation to support the assertion. Finally, Employer asserted that while the great majority of items cooked and baked were for use within the Mexican community, Employer was one of the few bakers who also baked specialized items such as Argentinian items. With regard to the salary, Employer argued that, given that the employee would also have to bake cakes, the higher salary was warranted.

The CO issued a Final Determination (“FD”) on June 11, 2002. (AF 2). The CO found that Employer had failed to show that the position at issue existed prior to the Alien’s hire, or that it was able to pay the offered wage on a permanent full-time basis. In this respect, Employer failed to provide documentation, including the tax returns and business licenses, as requested. With regard to the years of experience, the CO found that the job description made no mention of pies, an essential part of a pastry cook’s duties. It did mention breads, which were beyond the scope of a pastry cook’s duties. The CO pointed out that the Alien had no stated experience as a pastry cook.

The CO found that Employer had failed to respond to the issue of the requirement of experience in Argentine baking. Labor certification, therefore, was denied.

Employer filed a Notice of Appeal on June 21, 2002. (AF 1). Therein, Employer argued that the CO appeared to have a “pre-conceived intent on denying the case and paid little or no attention to rebuttal information.” (AF 2). This matter was subsequently forwarded to the Board of Alien Labor Certification Appeals (“Board” or “BALCA”).

DISCUSSION

In the instant case, the CO reasonably requested documentation regarding the issues raised in the NOF. Employer chose to ignore the request for documentation. It provided none of the documentation which was specifically requested, and gave no explanation or justification for that failure.

An Employer must provide directly relevant and reasonable documentation sought by the CO. *See Gencorp*, 1987-INA-659 (Jan. 13, 1988)(*en banc*). Failure to submit documentation reasonably requested by the CO warrants denial of labor certification. *Rouber International*, 1991-INA-44 (March 31, 1994). Employer herein failed to produce any of the requested documentation. It failed to produce documentation regarding its ability to pay the stated wage or documentation that the position existed and had been previously filled at the same requirements. Accordingly, based upon Employer's failure to provide documentation reasonably requested by the CO, we find that certification was properly denied, and it is unnecessary to address the remaining issues.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board
of Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.